



Fremont City Council

3300 Capitol Avenue
Fremont, CA 94538

SCHEDULED

Meeting: 03/21/17 07:00 PM
Div/Dept: City Manager's Office
Category: Code Adoptions & Amendments

STAFF REPORT (ID # 3010)

Sponsors:
DOC ID: 3010

DISTRICT-BASED ELECTIONS - Adopt a resolution declaring the City of Fremont's intent to transition from at-large to district-based elections, outlining specific steps to be undertaken to facilitate the transition, and estimating a time frame for action.

Contact Persons:

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Executive Summary: The City received a certified letter on February 15, 2017, from Kevin Shenkman, an attorney with the law firm of Shenkman & Hughes in Malibu, California. The letter asserts that the City's at-large electoral system dilutes the ability of Latinos (a protected class) to elect candidates of their choice or otherwise influence the outcome of Fremont's council elections. As a result, it violates the California Voting Rights Act (CVRA). Mr. Shenkman claims "polarized voting" may be occurring and threatens litigation if the City declines to voluntarily convert to district-based elections for Councilmembers.

The City of Fremont currently utilizes an at-large election system, which means that the electors from the entire City choose each of the four (4) Councilmembers and the Mayor. A district-based election system is one in which the city is physically divided into separate districts, each with one Councilmember who resides in the district and is chosen by the electors residing in that particular district.

Cities throughout the State have increasingly been facing legal challenges such as this to their "at-large" systems of electing City councilmembers. Almost all have settled claims out of court by voluntarily shifting to district-based elections. On September 28, 2016, the Governor signed AB 350 into law, which attempts to provide a "safe harbor" from CVRA litigation for cities. If a city receives a demand letter, such as in Fremont's case, the city is given 45 days of protection from litigation to assess its situation. If within that 45 days, a city adopts a resolution declaring the Council's intent to transition from at-large to district-based elections, outlining specific steps to be undertaken to facilitate the transition, and estimating a time frame for action, then a potential plaintiff is prohibited from filing a CVRA action for an additional 90 day period.

On March 7, 2017, the City Council met in closed session to consider the threatened CVRA litigation and after weighing the legal implications and potential costs of such litigation, directed staff to move forward with the resolution of intent to transition from at-large to district-based elections in order to take advantage of the "safe harbor" allowances under AB 350. Under this "safe harbor", the City is required to hold five (5) public hearings within the allotted 90-day framework. The public hearings will give the community an opportunity to weigh in on the composition of the districts and to provide input regarding the content of the draft maps and the proposed sequence of elections. The final public hearing will be when Council votes to consider an ordinance establishing district-based elections.

BACKGROUND/ANALYSIS: The City received a certified letter on February 15, 2017, from Kevin Shenkman, an attorney with the law firm of Shenkman & Hughes in Malibu, California (Attachment A). The letter asserts that the City's at-large electoral system dilutes the ability of Latinos (a protected class) to elect candidates of their choice or otherwise influence the outcome of Fremont's council elections and as a result, it violates the California Voting Rights Act (CVRA) in that Fremont voting is racially polarized, resulting in minority vote dilution. Mr. Shenkman claims "polarized voting" may be occurring and threatens litigation if the City declines to voluntarily convert to district-based elections for Councilmembers.

The City of Fremont currently utilizes an at-large election system, which means that the electors from the entire City choose each of the four (4) Councilmembers and the Mayor. A district-based election system is one in which the city is physically divided into separate districts, each with one Councilmember who resides in the district and is chosen by the electors residing in that particular district.

The California Voters Rights Act (CVRA)

The CVRA was signed into law in 2002. The CVRA prohibits an at-large method of election that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election. The law's intent is to expand protections against vote dilution over those provided by the Federal Voting Rights Act of 1965 (FVRA). The law was also motivated, in part, by the lack of success by plaintiffs in California in lawsuits challenging at-large electoral systems brought under the FVRA. The passage of the CVRA made it much easier for plaintiffs to prevail in lawsuits against public entities that elected their members to its governing body through "at-large" elections. A plaintiff need only prove the existence of "racially polarized voting" to establish liability under the CVRA. Other factors are also relevant in determining liability. Proof of intent on the part of voters or elected officials to discriminate against a protected class is not required.

As a result, cities throughout the State have increasingly been facing legal challenges to their "at-large" systems of electing City council members. Almost all have settled claims out of court by essentially agreeing to voluntarily shift to district-based elections. Those that have defended CVRA challenges in the courts have ultimately either voluntarily adopted, or have been forced to adopt, district-based elections. The CVRA grants a prevailing plaintiff the right to recover reasonable attorneys' fees and expert witness fees. This has resulted in payment of huge amounts of money in attorneys' fees by cities that have chosen to litigate the CVRA challenge. On the other hand, even if the City prevails, it cannot recover either attorneys' fees or costs. Also, the City would remain vulnerable to subsequent litigation brought under the CVRA by different plaintiffs.

California Voter Rights Act Reform (AB 350), a "Safe Harbor"

On September 28, 2016, the Governor signed AB 350 into law, codified as Elections Code section 10010 (effective on January 1, 2017). The legislation attempts to provide a "safe harbor" from CVRA litigation for cities. If a city receives a demand letter, such as in Fremont's case, the city is given 45 days of protection from litigation to assess its situation. If within that 45 days, a city adopts a resolution declaring the Council's intent to transition from at-large to district-based elections, outlining specific steps to be undertaken to

facilitate the transition, and estimating a time frame for action, then a potential plaintiff is prohibited from filing a CVRA action for an additional 90 day period. Thus, the legislation provides time for the City to assess and implement a transition to a district based election system before a lawsuit may be filed. The legislation sets forth a number of steps a city must take in the effort to assess and transition to a district based election system, including five (5) public hearings. Under AB 350, a city's liability is capped at \$30,000 if it follows this process after receiving a threat, and the plaintiff must show financial documentation that these costs were actually incurred.

Financial and Legal implications

Cities that have attempted to defend their existing "at-large" system of City Council elections in court have incurred significant legal costs, including attorneys' fees incurred by plaintiffs. Award in these cases have reportedly reached \$3,500,000 and beyond. When sued, the settlements entered into by cities typically have included paying the plaintiff's attorneys' fees. For example, in February 2015, the City of Santa Barbara reportedly paid \$900,000 in attorneys' fees and expert costs to settle their CVRA lawsuit. Another example is the City of Palmdale that incurred expenses in excess of \$4,500,000 in its unsuccessful attempt to defend against a lawsuit brought under the CVRA. To date, staff is unaware of any city that has prevailed in defending its "at-large" system of election under a claim filed by any individual or group under the CVRA.

On March 7, 2017, the City Council met in closed session to consider the threatened CVRA litigation and after weighing the legal implications and potential costs of such litigation, directed staff to move forward with the resolution of intent to transition from at-large to district-based elections in order to take advantage of the "safe harbor" allowances under AB 350. Accordingly, staff is recommending City Council adopt the resolution declaring its intention to transition from at-large to district-based elections following the procedures required by Elections Code section 10010, as amended by AB 350, to establish voting district elections. Staff makes this recommendation due to the extraordinary costs to successfully defend against a CVRA lawsuit and the fact that it appears no city has prevailed against a CVRA lawsuit.

At-large to District-Based Transition

Pursuant to Elections Code 10010, the City is required to hold five (5) public hearings within the allotted 90-day "safe-harbor" framework. The public hearings will give the community an opportunity to weigh in on the composition of the districts during the first two (2) public hearings. Subsequently, draft district maps will be drawn and two (2) additional public hearings will be held for the public to provide input regarding the content of the draft maps and the proposed sequence of elections. The final public hearing will be when the Council votes to consider an ordinance establishing district-based elections.

Most communities have taken a phased approach to implementing district-based elections. By law, the terms of sitting Councilmembers cannot be cut short. The City Council will have an opportunity to determine the number of districts to be formed and how their boundaries are defined. This will be decided upon by the City Council based on information from the initial public hearings to be held as required by California Elections Code section 10010, and other appropriate considerations, should it adopt the proposed resolution.

FISCAL IMPACT: If the City Council concurs with Staff's recommendation, there will be significant staff time needed to transition to district-based elections and to administer the process including the need for five (5) public hearings. The City will also incur the costs for a demographer, elections consultant, and special legal counsel. Additionally, the City will be required to reimburse the plaintiff for its documented attorney's fees and costs up to \$30,000. If the City Council chooses to maintain at-large elections and defend a potential lawsuit, the costs and attorneys' fees would likely exceed \$1,000,000 and would be a General Fund liability which would be a significant unexpected expense.

ENVIRONMENTAL REVIEW: This action is not a project within the meaning of the California Environmental Quality Act (CEQA) Guidelines Sections 15378 and 15061(b)(3) as it is an organizational structure change that will not result in any direct or indirect physical change in the environment.

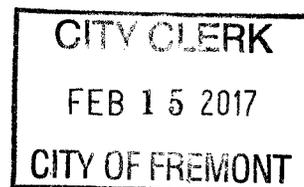
ATTACHMENTS:

- Demand Letter from Shenkman & Hughes
- CVRA Resolution of Intent

RECOMMENDATION: Adopt a resolution declaring the City of Fremont's intent to transition from at-large to district-based elections, outlining specific steps to be undertaken to facilitate the transition, and estimating a time frame for action.



28905 Wight Road
Malibu, California 90265
(310) 457-0970
kshenkman@shenkmanhughes.com



VIA CERTIFIED MAIL

February 8, 2017

City Clerk – Fremont
3300 Capitol Ave # A
Fremont, CA 94538

Re: Violation of California Voting Rights Act

The City of Fremont (“Fremont”) relies upon an at-large election system for electing candidates to its City Council. Moreover, voting within Fremont is racially polarized, resulting in minority vote dilution, and therefore Fremont’s at-large elections violate the California Voting Rights Act of 2001 (“CVRA”).

The CVRA disfavors the use of so-called “at-large” voting – an election method that permits voters of an entire jurisdiction to elect candidates to each open seat. *See generally Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 667 (“*Sanchez*”). For example, if the U.S. Congress were elected through a nationwide at-large election, rather than through typical single-member districts, each voter could cast up to 435 votes and vote for any candidate in the country, not just the candidates in the voter's district, and the 435 candidates receiving the most nationwide votes would be elected. At-large elections thus allow a bare majority of voters to control *every* seat, not just the seats in a particular district or a proportional majority of seats.

Voting rights advocates have targeted “at-large” election schemes for decades, because they often result in “vote dilution,” or the impairment of minority groups’ ability to elect their preferred candidates or influence the outcome of elections, which occurs when the electorate votes in a racially polarized manner. *See Thornburg v. Gingles*, 478 U.S. 30, 46 (1986) (“*Gingles*”). The U.S. Supreme Court “has long recognized that multi-member districts and at-large voting schemes may operate to minimize or cancel out the voting strength” of minorities. *Id.* at 47; *see also id.* at 48, fn. 14 (at-large elections may also cause elected officials to “ignore [minority] interests without fear of political consequences”), citing *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *White v. Register*, 412 U.S. 755, 769 (1973). “[T]he majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.” *Gingles*, at 47. When racially polarized

defeat the choices of minority voters.” *Gingles*, at 47. When racially polarized voting occurs, dividing the political unit into single-member districts, or some other appropriate remedy, may facilitate a minority group's ability to elect its preferred representatives. *Rogers*, at 616.

Section 2 of the federal Voting Rights Act (“FVRA”), 42 U.S.C. § 1973, which Congress enacted in 1965 and amended in 1982, targets, among other things, at-large election schemes. *Gingles* at 37; see also Boyd & Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History* (1983) 40 Wash. & Lee L. Rev. 1347, 1402. Although enforcement of the FVRA was successful in many states, California was an exception. By enacting the CVRA, “[t]he Legislature intended to expand protections against vote dilution over those provided by the federal Voting Rights Act of 1965.” *Jauregui v. City of Palmdale* (2014) 226 Cal. App. 4th 781, 808. Thus, while the CVRA is similar to the FVRA in several respects, it is also different in several key respects, as the Legislature sought to remedy what it considered “restrictive interpretations given to the federal act.” Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, p. 2.

The California Legislature dispensed with the requirement in *Gingles* that a minority group demonstrate that it is sufficiently large and geographically compact to constitute a “majority-minority district.” *Sanchez*, at 669. Rather, the CVRA requires only that a plaintiff show the existence of racially polarized voting to establish that an at-large method of election violates the CVRA, not the desirability of any particular remedy. See Cal. Elec. Code § 14028 (“A violation of Section 14027 **is established** if it is shown that racially polarized voting occurs ...”) (emphasis added); also see Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, p. 3 (“Thus, this bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown).”)

To establish a violation of the CVRA, a plaintiff must generally show that “racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision.” Elec. Code § 14028(a). The CVRA specifies the elections that are most probative: “elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class.” Elec. Code § 14028(a). The CVRA also makes clear that “[e]lections conducted prior to the filing of an action ... are more probative to

establish the existence of racially polarized voting than elections conducted after the filing of the action.” *Id.*

Factors other than “racially polarized voting” that are required to make out a claim under the FVRA – under the “totality of the circumstances” test – “are probative, but not necessary factors to establish a violation of” the CVRA. Elec. Code § 14028(e). These “other factors” include “the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns.” *Id.*

Fremont’s at-large system dilutes the ability of Latinos (a “protected class”) – to elect candidates of their choice or otherwise influence the outcome of Fremont’s council elections.

The most recent council election (2016) is illustrative. In that election, a Latino candidate – Laurie Manuel – ran and lost to three non-Latinos. The same is true in 2010, when another Latino candidate – Vladimir Rodriguez – ran. In both instances, the Latino candidates received significant support from Latino voters, but fell short of securing a seat in Fremont’s at-large election due to the bloc voting of Fremont’s majority non-Latino electorate. In fact, as a result of this racially polarized voting, Fremont does not appear to have had a single Latino council member in recent history.

According to recent data, Latinos comprise approximately 14% of the population of Fremont, which totals 225,221. The contrast between the significant Latino population and the very limited success of Latinos to be elected to the City Council is telling. Moreover, it is rare for a city as large as Fremont to have maintained an at-large election system. We note that the adoption of district elections has been a significant topic of public discourse, yet the city council has not acted to make Fremont’s elections fair and compliant with the CVRA.

As you may be aware, in 2012, we sued the City of Palmdale for violating the CVRA. After an eight-day trial, we prevailed. After spending millions of dollars, a district-based remedy was ultimately imposed upon the Palmdale city council, with districts that combine all incumbents into one of the four districts.

Given the historical lack of Latino representation on the city council in the context of racially polarized elections, we urge Fremont to voluntarily change its at-large system of electing council members. Otherwise, on behalf of residents within the jurisdiction, we will be forced to seek judicial relief. Please advise us no later than March 25, 2017 as to whether you would like to discuss a voluntary change to your current at-large system.

We look forward to your response.

Very truly yours,

A handwritten signature in black ink, appearing to read 'KS', is positioned above the printed name.

Kevin I. Shenkman

7016 0910 0002 2598 0208



CERTIFIED MAIL
PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT
OF THE RETURN ADDRESS. TOLD AT DOTTED LINE

7016 0910 0002 2598 0208

City Clerk - Fremont
3300 Capitol Ave, #A
Fremont, CA 94538

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DRAFT

RESOLUTION NO. 2017-XX

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF FREMONT, CALIFORNIA, DECLARING ITS INTENT TO TRANSITION FROM AT-LARGE TO DISTRICT-BASED COUNCILMEMBER ELECTIONS, OUTLINING SPECIFIC STEPS TO BE UNDERTAKEN TO FACILITATE THE TRANSITION AND ESTIMATING A TIME FRAME FOR ACTION PURSUANT TO ELECTIONS CODE SECTION 10010

WHEREAS, members of the City Council of the City of Fremont ("City") are currently elected in "at-large" elections, in which each City Councilmember is elected by the registered voters of the entire City; and

WHEREAS, California Government Code Section 34886 in certain circumstances, authorizes the legislative body of a city of any population to adopt an ordinance to change its method of election from an "at-large" system to a "district-based" system in which each council member is elected only by the voters in the district in which the candidate resides; and

WHEREAS, the City received a certified letter on February 15, 2017, from Kevin Shenkman of the law firm of Shenkman & Hughes asserting that the City's at-large council member electoral system violates the California Voting Rights Act ("CVRA") and threatening litigation if the City declines to voluntarily change to a district-based election system for electing council members; and

WHEREAS, a violation of the CVRA is established if it is shown that racially polarized voting occurs in elections (Elections Code Section 14028(a)). "Racially polarized voting" means voting in which there is a difference in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate (Elections Code Section 14026(e)); and

WHEREAS, although the letter was not accompanied by any evidence to support the claim of a CVRA violation, the City Council has directed staff to initiate the process to establish by-district elections to avoid costs associated with defending a lawsuit based on the CVRA, even if that lawsuit settles; and

WHEREAS, the California Legislature in amendments to Elections Code Section 10010, has provided a method whereby a jurisdiction can expeditiously change to a by-district election system and avoid the high cost of litigation under the CVRA; and

WHEREAS, the public interest would be better served by council consideration of a proposal to transition to a district-based electoral system because of: 1) the extraordinary cost to defend against a CVRA lawsuit, 2) the risk of losing such a lawsuit which would require the City to pay the prevailing plaintiffs' attorneys' fees, and 3) the reimbursable costs and attorneys' fees would be capped at a maximum of \$30,000 by following the procedures set forth in Elections Code Section 10010 as amended by AB 350; and

WHEREAS, prior to the City Council's consideration of an ordinance to establish district boundaries for a district-based electoral system, California Elections Code Section 10010 requires all of the following:

1. Prior to drawing a draft map or maps of the proposed boundaries of the districts, the City shall hold at least two (2) public hearings over a period of no more than thirty (30) days, at which the public will be invited to provide input regarding the composition of the districts;
2. After all draft maps are drawn, City shall publish and make available for release at least one draft map and, if members of the City Council will be elected in their districts at different times to provide for staggered terms of office, the potential sequence of the elections shall also be published. The City Council shall also hold at least two (2) additional hearings over a period of no more than forty-five (45) days, at which the public shall be invited to provide input regarding the content of the draft map or maps and the proposed sequence of elections, if applicable. The first version of a draft map shall be published at least seven (7) days before consideration at a hearing. If a draft map is revised at or following a hearing, it shall be published and made available to the public for at least seven (7) days before being adopted; and

WHEREAS, the City has retained special legal counsel and an experienced demographer to assist the City to develop a proposal for a district-based electoral system; and

WHEREAS, the adoption of a district-based elections system will not affect the terms of any sitting Council Member, each of whom will serve out his or her current term.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF FREMONT
RESOLVES AS FOLLOWS:

SECTION 1. The City Council hereby resolves to consider adoption of an ordinance to transition to a district-based election system as authorized by Government Code Section 34886 for use in the City's General Municipal Election for City Councilmembers beginning in November 2018.

SECTION 2. The City Council directs staff to work with the City's special legal counsel and demographer, and other appropriate consultants as needed, to provide a detailed analysis of the City's current demographics and any other information or data necessary to prepare a draft

map that divides the City into voting districts in a manner consistent with the intent and purpose of the California Voting Rights Act and the Federal Voting Rights Act.

SECTION 3. The City Council hereby approves the tentative timeline as set forth in Exhibit A, attached to and made a part of this resolution, for conducting a public process to solicit public input and testimony on proposed district-based electoral maps before adopting any such map.

SECTION 4. The timeline contained in Exhibit A may be adjusted by the City Manager as deemed necessary, provided that such adjustments shall not prevent the City from complying with the time frames specified by Elections Code Section 10010.

SECTION 5. The City Council directs staff to post information regarding the proposed transition to a district based election system, including maps, notices, agendas and other information and to establish a means of communication to answer questions from the public.

ADOPTED, _____, 2017, by the City Council of the City of Fremont, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Mayor

ATTEST:

APPROVED AS TO FORM:

City Clerk

Sr. Deputy City Attorney

EXHIBIT A

**TENTATIVE TIMELINE: CONSIDERATION AND IMPLEMENTATION OF
"DISTRICT-BASED" ELECTION METHOD**

DATE	EVENT	COMMENT
March 21, 2017	Day 1 Resolution of Intention: City Council adopts Resolution declaring its intention to transition from at-large to district-based elections.	CVRA Action cannot be commenced for 90 days.
March 22 - April 3, 2017	Public Outreach	Re: Process & Participation NO MAPS YET DRAWN
April 4, 2017	1st Public Hearing	Re: Composition of Districts NO MAPS YET DRAWN
April 18, 2017	2nd Public Hearing	Re: Composition of Districts NO MAPS YET DRAWN
April 25, 2017	Post Draft Maps and Potential Sequence of Elections	
May 2, 2017	3rd Public Hearing	Re: Draft Maps
May 9, 2017	Any Amended Maps Posted	
May 16, 2017	4th Public Hearing Select Map Council introduces ordinance establishing district elections, including District Boundaries and Election Sequence	Re: Draft Maps If selected map is amended, ordinance cannot be introduced until 7 days after amended map is published.

June 6, 2017	5th Public Hearing 2nd reading of ordinance establishing district elections: approval or denial of ordinance	
June 19, 2017	Day 90	
July 6, 2017	Effective date of ordinance establishing district elections	
June 19, 2018	Council adopts resolutions calling for election, requesting consolidation, etc.	
July 16, - August 10, 2018	Candidate nomination period	
November 6, 2018	First election using new district-based election system	